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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

IRA DAVES,

Plaintiff,

vs.

ERIC H. HOLDER, JR., Attorney
General of the United States.

Defendant.

Case No. CV 08-07376-CAS (AGRx)

*Assigned to Hon. Christina A. Snyder
Courtroom 5*

SECOND AMENDED COMPLAINT

[Pursuant to 42 U.S.C. Sections 2000e *et seq.*, as amended]

JURY TRIAL DEMANDED

This Second Amended Complaint is based on Daves' personal knowledge and upon information and belief.

JURISDICTION & VENUE

1. This suit is for damages and injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331 as this is a civil action arising under the laws of the United States.

1 2. This Court may assert personal jurisdiction over the parties in this case.
2 Daves resides in Los Angeles, California. Dave's employer, the Civil Division of the
3 United States Attorney for the Central District of California ("USAO"), is located in this
4 judicial district.
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6 3. Venue is proper under 28 U.S.C. § 1391(b). All or most of the events or
7 omissions giving rise to Daves' claims occurred in this judicial district.
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9 **THE PARTIES**

10 **The Plaintiff: AUSA Ira Daves**

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12 4. Daves is currently employed as an Assistant United States Attorney
13 ("AUSA") in the USAO. The USAO is an agency of the federal government and is
14 subject to the laws of the United States. The AUSAs serve as the nation's principal
15 litigators under the direction of the Attorney General.
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17 **The Defendant: U.S. Attorney General, Eric Holder**

18 5. Defendant Eric H. Holder, Jr. is the Attorney General of the United States.
19 He heads the Department of Justice ("DOJ"). Holder is substituted under Fed.R.Civ.P.
20 25(d) for Michael B. Mukasey, the former Attorney General. The DOJ is an agency of the
21 federal government and is subject to the laws of the United States. The Executive Office
22 for United States Attorneys ("EOUSA") is an agency and of the DOJ and is also subject to
23 the laws of the United States. EOUSA was created to provide for close liaison between
24 the DOJ and the USAO throughout the country. During the relevant time periods,
25 EOUSA provided general executive assistance and supervision to USAO.
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STATEMENT OF FACTS

6. Daves received his J.D. from Harvard Law School. After clerking and three years as an associate at O'Melveny & Meyers, Daves accepted an offer to join the USAO as an AUSA in October 1995.

7. The docket of a civil AUSA consists of defending federal agencies and federal employees in all kinds of civil lawsuits. When he was hired, Daves was told that he serve as a general civil litigator.

8. Over the last 14 years, Daves established an exemplary record at the USAO. He got favorable results in the vast majority of his cases—which were mostly Title VII cases—and Daves was repeatedly rewarded for his hard work and effective advocacy.

9. Daves has been recognized with numerous commendations, including one that Leon W. Weidman—the Chief of the Civil Division throughout Daves' tenure—called “one of the most impressive commendations letters I have ever received.” Daves has received multiple honors, including a Special Achievement Award for Sustained Superior Performance of Duty and a highly coveted nomination for a Director's Award. Soon after the nomination, the U.S. Attorney assigned Daves to assist the DOJ in a high-profile pattern-and-practice investigation of a local police department.

10. That pattern-and-practice investigation was a decade ago. Since then, Daves' career at the USAO has steadily stalled, eventually reaching a dead-end. Daves hit this dead-end because of a disagreement with his managers over the types of cases Daves is qualified to handle versus the types of cases they are willing to give him. The types and

1 complexity of cases that an AUSA handles largely determines his career in the USAO, so
2 this dispute raises fundamental questions about Daves' present and future marketability
3 and earnings potential.
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5 11. Throughout his employment at the USAO, Daves has engaged in EEO
6 activities, formal and informal. These activities include service on the USAO's hiring
7 committee, serving as the office's Special Emphasis Program Manager responsible for
8 representing minority interests to management, giving deposition testimony in connection
9 with a co-worker's Equal Employment Opportunity ("EEO") complaint, voicing
10 disapproval of the office's discriminatory policies and practices with respect to the hiring
11 of externs, criticizing management's case assignment practices to DOJ auditors, and filing
12 the EEO complaint underlying this action.
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16 12. Since Daves' initial requests to increase his development by expanding his
17 practice area, Daves' supervisors, all of whom reported directly to Weidman, uniformly
18 and without good reason denied him meaningful work outside of Title VII.
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20 13. Despite consistently favorable reviews throughout his tenure, Daves'
21 supervisors never permitted him to train a new attorney in litigation, even for a Title VII
22 case. They denied him these opportunities even as they told him that, as a senior attorney,
23 he was expected to mentor and assist junior attorneys. The rare dual assignment given to
24 Daves was only at Daves' repeated request and only in an emergency.
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26 14. At the same time, no such restrictions were placed on the vast majority of
27 similarly situated AUSAs, most of whom were white. The Civil supervisors have given
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1 numerous if not nearly every one of these other civil AUSAs, junior and senior attorneys
2 alike, a meaningful and wide variety of challenging, career-enhancing assignments,
3 including dual assignments intended to train and assist newer attorneys.
4

5 15. When a white, male attorney defaulted in a case, Daves was assigned to
6 handle the default so that the attorney's European vacation would not be disrupted. In
7 contrast, when management mistakenly assumed that Daves needed coverage for a
8 hearing in one of his *pro per* prisoner cases, they called Daves while he was overseas on
9 vacation and ordered him back to the office to cover it. Senior white male attorneys had
10 no difficulty receiving assistance from junior attorneys to cover the more routine research
11 or paralegal-type duties that arise in litigation. A senior white male attorney was relieved
12 of a Title VII assignment without being required, as Daves had been in comparable
13 circumstances, to accept a case from the attorney to whom one of his numerous Title VII
14 case was transferred.
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16 16. The preferential treatment given to these and other white attorneys has
17 benefited their careers. In addition to what has already been described, several white male
18 attorneys left General Civil to pursue career opportunities in the Criminal Division, and a
19 number of them were subsequently promoted to supervisory positions. One was soon
20 thereafter appointed to a federal magistrate judge position. African-American attorneys
21 who have devoted the better part of their legal careers working in the Civil Division have
22 not received career advancements even remotely comparable. At least two white male
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1 attorneys were, without controversy, provided secretaries who could take dictation.

2 Daves was denied such assistance, without discussion.

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4 17. When Daves asked his managers why, they insisted that he continue to focus
5 on Title VII, in isolation and without any significant interaction with junior attorneys,
6 management gave various responses that seemed plausible at the time. At the same time,
7 management repeatedly assured Daves that there was no reason he would not someday be
8 assigned the kinds of cases he had been requesting. Daves believed his managers.

10 18. Daves' managers' reasons included that there was a shortage of attorneys
11 who had the ability or experience to handle Title VII cases, which were among the most
12 difficult cases in the office and therefore required Daves' particular training and expertise.
13 Daves accepted that explanation until he started noticing that most of the newest, least
14 experienced attorneys in the office were routinely assigned Title VII cases. As Daves
15 finally realized, this refusal arises from his managers' prejudice—conscious, unconscious,
16 or some combination of both.

19 19. Once Daves became a senior litigator in the office, all but a few of his
20 assignments were cases that could have been assigned to junior attorneys but were instead
21 assigned to Daves. These were dead-end assignments. Further, many of these cases were
22 pending in the Eastern and Southern Divisions of the Central District, which forced Daves
23 to spend a disproportionate amount of his time traveling to the federal courthouses in
24 Riverside and Santa Ana.

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1 20. Upon information and believe, Daves' managers began to impose on Daves a
2 series of secret tests through which Daves could ostensibly prove himself. These
3 obstructions were designed to concoct a pretext for refusing to assign Daves complex
4 cases outside Title VII. Management's plan was implemented with the express
5 concurrence or acquiescence from executive members of the Front Office at USAO and
6 upper-level officials at EOUSA.
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9 21. Although unaware that he was essentially being set-up, Daves did everything
10 asked of him. For example, Daves successfully handled a last-minute Ninth Circuit
11 argument. The Civil Appellate Chief reported that Daves' argument was "magnificent."
12

13 22. Daves could not have known that management was manufacturing a pretext
14 for denying him opportunities because management's decision-making process was
15 secret. Most of management's actions are confidential. Any charge of racism, sexism, or
16 retaliation necessarily would have to be based on inference and educated guesswork.
17

18 23. The six-person management team, with input from the Front Office, is able
19 during their confidential sessions, to strategize ways in which to position favored
20 employees for future advancement—for instance, by awarding them special assignments
21 through which they can improve their skills and demonstrate their mettle, or by
22 highlighting their accomplishments to executive officials higher on the chain.
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24 Conversely, management is able to consign disfavored employees to professional
25 obscurity—for example, by assigning them cases they cannot reasonably be expected to
26 handle without substantial administrative or other support and then withdrawing that
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1 support, or by regularly disparaging them to higher officials. These matters are carefully
2 calculated and not left to chance.

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4 24. It was under these conditions that management was able to effectively
5 prevent his opportunity for advancement, once it was determined that that was the course
6 of action it wished to take. The supervisors, Weidman in particular, simply could not
7 see—or perhaps would not allow themselves or others to see—someone like Daves—
8 black, openly gay, assertive on issues related to diversity and gender—representing the
9 office in highly visible cases. Their views of Daves’ abilities, insofar as they were
10 denigrating, were closely tied to deeply ingrained race and gender biases, as were their
11 reactions to Daves’ personality, which often contradicted their expectations of how a
12 black man holding a subordinate position should behave.
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16 25. During a private discussion with Weidman, Daves asked if there was
17 anything he needed to do to be assigned more substantial cases outside Title VII.
18 Weidman assured Daves that there was no problem and that it was just a matter of time
19 before Daves would receive the requested assignments. Weidman later used the
20 information he gathered during these private discussions and other conversations to
21 bolster his pretext for denying Daves the assignments he had been requesting and, by all
22 objective indications, had fairly earned.
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25 26. On January 31, 2008, management told Daves, for the first time, that it was
26 not going to treat him fairly in its case assignments, dual attorney assignments and
27 promotions, based on an “undisclosed” communication problem. Weidman held a
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1 disciplinary-type meeting in which he informed Daves that he had uncovered deficiencies
2 in Daves' performance dating back "a year or two." Weidman further informed Daves
3 that those performance deficiencies now precluded Daves from being assigned to the
4 kinds of non-Title VII cases he had been requesting for years.

6 27. Throughout the meeting, Weidman was demeaning and hostile. He described
7 Daves as arrogant and insufficiently grateful for the Title VII and *pro per* cases that he
8 had been assigned. Weidman declared—in a moment of inaccurate historical revision—
9 that he had hired Daves as "a Title VII lawyer."

11 28. When Daves objected that Weidman had never before mentioned these
12 alleged deficiencies, Weidman blurted, "*I'm telling you now!*" Rather than provide
13 specific facts, Weidman mentioned vague "communication" problems and "numerous
14 complaints" lodged against Daves, to which he had personally responded over the past
15 year or two. When Daves asked for specifics, Weidman demurred, declining to identify
16 the complainants or reveal any particulars.

18 29. Upon information and belief, Weidman refused to provide the particulars
19 because there were none to give. Only days before the January 31st meeting, Daves had
20 received—again—the highest possible performance rating for his work in the prior year.
21 A year or two of complaints requiring Weidman's personal intervention would not have
22 supported the rating that Daves had just received.

24 30. Daves was blindsided. Before the January 31st meeting, his managers had
25 never told him about these alleged performance problems, so he had no opportunity to
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1 address them before his managers had made their decision. Management's justification
2 for the decision to formalize the denial of equal treatment was highly suspect.

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4 31. In an environment in which EEO lawyers at EOUSA were disproportionately
5 African-American, Weidman specifically and unequivocally told Daves that he had been
6 hired as "a Title VII lawyer." Given that environment, the term "Title VII lawyer" could
7 reasonably be understood as a code word for "black lawyer," the intent to discriminate
8 was thus implicit in Weidman's comment. Daves was demoralized.

9
10 32. Management's decision had a decided nexus to race and gender bias, as well
11 as punishment for employment activity protected by Title VII. Throughout his career,
12 Daves sought chances to thrive within the office at the same time that he pursued changes
13 that would improve it. To that end, Daves engaged in multiple EEO activities, such as
14 implementing measures designed to increase diversity within the office, all of which were
15 intended to improve the working conditions within the office and to fortify the USAO's
16 stated mission as an Equal Opportunity employer. It was those EEO activities that
17 constituted protected forms of expression under Title VII.

18
19 33. The meeting compelled Daves to realize—reasonably and for the first
20 time—that the difference in the treatment he had received in terms of his case assignments
21 and other job opportunities was, in fact, due to unlawful discrimination and retaliation for
22 some or all of his prior EEO activities. In fact, the insinuation that the sole African-
23 American male attorney did not have the mettle for heavy-weight litigation outside the
24 single area of employment discrimination was patently offensive.

1 34. Without knowing or suspecting it, Daves entered the USAO reporting to and
2 trying to impress a number of influential managers who harbored biases against two of the
3 historically disadvantaged groups to which he belongs. From the start, the default
4 assumption for Daves, in the minds of these supervisors, has been that he is somehow not
5 as good as his similarly situated white counterparts that his aptitude for first-chairing
6 high-exposure cases outside Title VII is somehow inferior to theirs, that he is, by
7 comparison, no more than minimally or questionably competent.

10 35. Opportunities to advance in the Civil Division were—and remain—few and
11 far between. When they arise, candidates for promotion are required to demonstrate a
12 wide variety of skills for litigating complex cases and for managing other attorneys.
13 These skills cannot be developed or demonstrated through the kinds of teeth-cutting cases
14 that Daves was repeatedly assigned over the years.

17 36. The discrimination evidenced by these facts is underscored by comments that
18 have been made to Daves or about Daves. During his initial interview for the position,
19 Daves inquired about promotional opportunities. He was told flat out that there were
20 none. At times, unflattering comments were made about Daves' personality. He has been
21 referred to in ways that were intended to irk him and raise questions about his
22 masculinity. After 11 years as an AUSA, Daves was told that a simple *pro per* prisoner
23 case was "in line" with where he was in his development. He was once admonished for
24 not doing his own secretarial work. When he first started, he was called "crazy" for
25 expressing an interest in doing Title VII cases.

1 37. In the time following the meeting, management has firmly stuck by its
2 adverse decision yet has declined to offer Daves any evidence supporting the offensive
3 default assumption on which it was implicitly based. Moreover, other AUSAs,
4 particularly white males, have not been comparably disadvantaged.

5
6 38. When Daves first complained to the appropriate DOJ officials about unlawful
7 discrimination, he was met with resistance, which reinforced Daves as *persona non grata*
8 in the office. Soon thereafter, and in direct response to the complaint Daves lodged with
9 their superiors at USAO and EOUSA, Daves' managers commenced carefully coordinated
10 steps designed not only to punish, silence, and discredit him, but also to deflect attention
11 away from their past and present discriminatory practices.

12
13 39. In particular, the managers of Civil—all of whom have enjoyed lengthy
14 careers in government and who were acting in flagrant self-interest to protect their
15 reputations at the expense of a hard, honest evaluation of the facts—enjoyed personal and
16 professional relationships with high ranking officials both within USAO and at EOUSA.
17 Faced with the charges Daves leveled regarding unlawful conduct, these managers relied
18 upon these relationships to bolster their own credibility and thwart any meaningful
19 investigation of the issues raised by Daves' complaint.

20
21 40. The collusion crystallized during the administrative processing of Daves'
22 complaint. The EEO office of the EOUSA, to which USAO management also reports,
23 unduly delayed commencing any investigation for six months. The investigator finally
24 assigned to the matter was adversarial and gave the matter only cursory attention. For
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1 instance, in a response to a complaint that focused on disparate treatment in case
2 assignments and other job opportunities, Civil management was not even asked, let alone
3 required, to produce a single document demonstrating and explaining their assignment
4 practices. In this way, and in others, management-level officials at the USAO and
5 EOUSA worked collectively and aggressively to undermine Daves' efforts to investigate
6 the systemic problems alleged in his complaint, perhaps the ultimate form of retaliation.
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9 41. The other forms of retaliation Daves has experienced since he first contacted
10 EEO in February 2008 have been skillful, relentless, and continue to this day. For
11 instance, management has repeatedly passed Daves over for career-enhancing
12 assignments, has played a series of administrative pranks on him, each of which was
13 designed to occupy his work time and undermine his morale, has bad-mouthed him and
14 segregated him from his colleagues, and most recently has even tried to set him up for a
15 swift, just-cause termination.
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18 42. On February 7, 2008, Daves provided EEO a Pre-Complaint Form, in which
19 he alleged disparate treatment in his work and mentoring assignments in the USAO. He
20 alleged that the disparate treatment was based on his race (African-American), gender
21 (male), age (49 at the time), sexual orientation (gay), and reprisal.
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24 43. EEO assigned Daves a counselor, who contacted Daves on February 22,
25 2008, to advise him of his rights. Daves specifically encouraged his counselor to obtain
26 records of case assignments directly from management, which was in a much better
27 position to provide all statistical information. Daves requested an office-wide
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1 examination of case assignments over a period of years in an effort to redress a pattern
2 and practice of unlawful discrimination.

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4 44. On March 7, 2008, Daves' EEO counselor confirmed that the scope of his
5 complaint would include hostile work environment and pattern and practice allegations.

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7 45. In his formal complaint, Daves checked the boxes for discrimination based
8 on race, sex, age, sexual orientation, and reprisal. Daves further alleged a "continuing
9 denial of opportunity for advancement through invidious selection of work assignments
10 and mentoring opportunities; denial of promotion; continuing failure to take prompt,
11 effective remedial action for discrimination and retaliation under each of the following
12 theories: disparate treatment, pattern and practice, and hostile work environment."

13
14 46. Yet despite being notified verbally and in writing of all issues set forth in
15 Daves' complaint, including allegations that Daves was presently being subjected to a
16 hostile work environment requiring prompt investigation and, if necessary, prompt,
17 effective remedial action, EEO's response was lazy and ineffective.

18
19 47. Because he had not been afforded prompt remedial measures, Daves
20 experienced ever-escalating supervisory harassment in retaliation for his EEO activity.
21 He reported the harassment to his EEO counselor, but his counselor declined to intervene.

22
23 48. In August 2008, EEO finally assigned an investigator—Michele Crawford.

24
25 49. On September 2, 2008, Daves requested that his complaint be amended to
26 include additional related allegations based on recent events in his employment.
27 Specifically, Daves notified Crawford that management had been failing to ensure the
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1 prompt payment of his litigation expenses, had withdrawn a sizeable performance-based
2 monetary award that was recently issued to him, and had failed to take adequate steps to
3 fix his computer, which was crashing daily.
4

5 50. Crawford confirmed that she was serving two functions. She was serving as
6 the agency's investigator, charged with developing "an impartial and appropriate factual
7 record." But she also apparently had been delegated responsibility for determining which
8 issues would be investigated.
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10 51. During her investigation, Crawford displayed a lack of tact and legal
11 acumen. One of her first questions to Daves was whether he "looked black." She seemed
12 unfamiliar with the facts that Daves provided in his previous statements. Although the
13 parties agreed to mediate Daves' dispute, the case did not settle and Daves proceeded with
14 this lawsuit.
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17 52. Following the filing of his EEO Complaint, the retaliation against Daves has
18 become more patent, even Daves' direct supervisor has ceased engaging in regular
19 communications, absent absolute necessity. In fact, all management-level employees
20 have rigidly avoided all contact with Daves, absent necessity. There is a palpable chill in
21 the air; the silence is provocative. Snubs, which often occur, are one thing; but the abject
22 failure to communicate regarding work-related issues has made it much more difficult for
23 Daves to perform basic job duties.
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26 53. Besides suffering administrative hassles, Daves received a substantial
27 increase in the paralegal-type duties he was required to perform, after Weidman reversed
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1 a long-standing work-sharing agreement with an agency. Daves' paralegal duties were
2 further increased when management assigned him a slew of cases filed against an agency
3 that management knew had limited administrative resources. In addition, his work
4 received a much greater and more critical level of scrutiny than it ever had.
5

6 54. Since taking his employment dispute to EEO, Daves has been specifically
7 instructed not to contact junior attorneys directly to request litigation assistance.
8

9 55. In addition to these other acts of discrimination, Daves was denied a
10 promotion to which he was fairly entitled. Weidman also made negative comments about
11 Daves when Daves applied for a magistrate judgeship.
12

13 56. Even if discriminatory choices like these were a reflection of clients'
14 preferences, that fact would not excuse this discrimination because client preferences
15 based on race stereotypes are not a "bona fide occupational qualification" under Title VII.
16

17 57. In April 2009, Daves was diagnosed as having developed acute medical
18 problems stemming from the severe stress of his workplace. The diagnosis required him
19 to take an extended leave of absence.
20

21 58. Daves has exhausted his administrative remedies. Administrative exhaustion
22 is not required where the remedies are inadequate, inefficacious, or futile, where pursuit
23 of them would irreparably injure the plaintiff, or where the administrative proceedings
24 themselves are void. After the 180-day deadline passed, it became abundantly clear that
25 Daves' multiple good-faith efforts to have the agency conduct an unbiased, thorough
26 investigation were misdirected. Yet, Daves still tried to resolve the matter successfully by
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1 mediation and conciliation. He did everything he could reasonably be expected to do.
2 EOUSA expressly acknowledged that Daves exhausted his administrative remedies when
3 it finally dismissed his complaint.
4

5 59. To the extent that the exhaustion requirement was not met with respect to any
6 particular claim, although Daves makes no concession on this point, the exhaustion
7 requirement was satisfied by principles of equity, such as waiver, estoppel, unclean hands,
8 and tolling, as set forth herein.
9

10 60. That this complaint encompasses unlawful discreet acts that pre-date the
11 January 31, 2008 meeting by a period exceeding 45 days does not render those events
12 untimely. Even if some of Daves' claims are time-barred, the filing of a timely charge is a
13 requirement that is subject to waiver, estoppel, and equitable tolling. By accepting Daves'
14 charge for investigation, EEO waived any objections to technical defects in the charge.
15 More importantly, any delay in Daves' discovery of the discrimination was not due to a
16 lack of diligent inquiry on his part. Management's aggressive, proactive steps to erect an
17 impenetrable wall of privacy and confidentiality around its assignment and other
18 personnel practices effectively shielded from discovery their unlawful nature. An
19 employer who, through the affirmative use of covert acts and deception, effectively avoids
20 the detection of its unlawful conduct and thereby prevents the timely filing of a complaint
21 is estopped from asserting lack of timeliness as an affirmative defense.
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27 61. Finally, management explicitly conditioned favorable performance ratings on
28 the extent to which employees placed the office's interests and needs over their own,

1 which had the intended effect of discouraging complaints. Management engaged in
2 additional practices that discouraged the exercise of employment rights. Under these
3 circumstances, the limitations period should be equitably tolled in favor of Daves who
4 could not otherwise resurrect any untimely claims.
5

6
7 **FIRST CAUSE OF ACTION:**

8 **DISPARATE TREATMENT BASED**

9 **ON RACE, GENDER AND EEO ACTIVITY**

10 62. Paragraphs 1 to 61 are incorporated here by reference.
11

12 63. In terms of management-level opportunities, the USAO has yet to break the
13 color barrier. Consistent with its historically exclusionary hiring and promotion practices,
14 USAO management has subjected Daves to roadblocks that no other attorney in the office
15 has experienced. He was singled out early in his career and has been treated markedly
16 less favorably than others similarly situated on account of race, gender and EEO activity.
17 The policy or pattern of discrimination constitutes its own violation. It is also proof of
18 management's intent to discriminate and the falsity of management's asserted justification
19 for its continuing discriminatory conduct.
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22 64. The allegedly temporary assignment of Daves as a "Title VII Lawyer" turned
23 into perpetual *de jure* segregation, affected through the continuing application of
24 egregious employment practices driven not by carefully studied individual assessment but
25 by stubborn, irrational prejudice -- the opposite of a meritocracy.
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1 65. When Daves first expressed an interest in broadening his practice area, he
2 was ignored. When he started pursuing it, he was punished. Civil management became
3 proactive in creating a *post hoc* justification for denying Daves equal opportunity.
4 Management engaged in a long, odious pattern and practice of improperly controlling and
5 diminishing Daves' once promising career prospects through the undue restriction of
6 numerous critical employment opportunities that would have helped him prepare for
7 advancement. The game was, thus, rigged.
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10 66. In furtherance of its unlawful segregation scheme, Civil management at
11 USAO historically and consistently assigned Daves, pursuant to a highly subjective and
12 secretive selection process, the least desirable, least prestigious, most arduous (and often
13 most emotion-laden) cases, the present discriminatory effects of which Daves still feels.
14 With rare exception, plum assignments have been reserved for Caucasian and Asian
15 attorneys, most of whom have now surpassed Daves in terms of litigation experience and
16 accomplishments -- a set back that is irreversible.
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20 67. Daves' inferior assignments were not sporadic or discreet acts but rather part
21 of a routine, regular practice or policy the continued application by which currently treats
22 similarly situated employees differently to this day.
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24 68. In situations where attorneys have comparable education, seniority, and work
25 appraisals, the fact that some have gotten more complex and varied cases gives them a
26 considerable advantage and may weigh crucially in determining who ultimately is deemed
27 better qualified for advancement. This is particularly true where, as here, serious
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1 questions of impermissible bias exist among decisionmakers who have consistently
2 exhibited a tendency to like or dislike employees based on mental associations between a
3 social group and certain traits, favorable or unfavorable.
4

5 69. Management's discriminatory practices have rendered Daves significantly
6 less competitive for promotion, as evidenced by the denial to Daves of a supervisory-level
7 promotion. The complex cases given to Daves' peers were invaluable learning
8 experiences. Working up a complex medical malpractice case could easily be, for
9 instance, the functional equivalent of attending a two-week training seminar in that highly
10 technical field of practice. The repeated failure to provide Daves the same or similar
11 types of invaluable learning experiences that his colleagues have received amounts to an
12 unjustifiable failure to train him in subject areas that are potentially career-enhancing.
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16 70. The disparate treatment to which Civil management subjected Daves did not
17 end with the discriminatory case assignment practices. When Daves first started engaging
18 in protected EEO activity, and then actively pursued cases that management deemed off-
19 limits, management singled Daves out for surreptitious paper-trailing. While continuing
20 to lavish praise, thereby placating Daves and raising unrealistic expectations, they secretly
21 plotted to build a case against him. They began secretly scrutinizing his work and
22 subjecting him to tests -- a fact that Daves' present supervisor subsequently confirmed.
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25 71. All these facts present a convincing mosaic, if not a clear acknowledgement,
26 that the disparate treatment experienced by Daves was *because of* his race, gender and
27 EEO activity. Once Daves started expressing a desire to expand his knowledge base and
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1 take on more challenging assignments, all his supervisors had to do was treat Daves like
2 an equal. This, they simply could not bring themselves to do.

3
4 72. By collecting damaging facts pertaining or relating to Daves' employment,
5 without giving Daves an opportunity to respond to any of those facts, Weidman was
6 setting the stage and laying a foundation for future disciplinary action, including
7 termination if possible, and manufacturing a defense that management could use, if
8 necessary, in future litigation -- a skillful form of employment sabotage.
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11 73. Even though the direct or indirect evidence of discrimination may not
12 consist of blatantly obvious signs, such as the frequent use of offensive racial or gender
13 epithets, it exists in most subtle but no less harmful forms, revealed by the striking
14 confluence of such multiple factors as: the display of doubts and fears about Daves that
15 were not exhibited about his white counterparts, the multiple incidents of suspicious
16 timing, the numerous revealing statements, and the often starkly superior treatment
17 Daves' similarly situated colleagues have received.
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20 74. The disparate treatment to which Daves was subjected was not supported by
21 legitimate, non-discriminatory reasons, and any and all reasons proffered by management
22 to date were pre-textual. Title VII does not excuse the offending disparate treatment, even
23 if it can be shown that similarly situated African-American attorneys who challenge
24 traditional gender norms were also treated more favorably than Daves, in material
25 respects. First, not all of those attorneys expressed a desire to litigate the types of cases
26 that Daves wished to litigate. Second, the USAO has consistently treated similarly
27
28

1 situated attorneys outside Daves' combined protected classes more favorably, suggesting
2 a heightened level of distrust or fear of Daves' particular combination of immutable
3 attributes. Title VII does not require that *all* other members within the plaintiff's class be
4 similarly or comparably mistreated for a violation to be firmly established.
5

6 75. The impermissible factors of race, gender, and EEO activity influenced
7 management's decision-making collectively, individually, or in some combination thereof
8 depending upon the particular adverse action or collection of adverse actions at issue.
9 Moreover, the retaliation that Daves sustained had discriminatory aspects, in that
10 management responded better to white males who complained of disparate treatment in
11 their case assignments. For this reason, although any attempt to separate Daves' identity
12 at the intersections of race, gender, and EEO participation could distort or ignore the
13 particular nature of his experience, Daves also asserts separate claims based on each
14 impermissible factor, as well as claims based on the combination of impermissible factors,
15 as well as a disparate treatment claim specifically based on facts supporting his retaliation
16 claim, which is set forth below.
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21 76. As a result of the unlawful conduct, Daves has suffered, and will continue to
22 suffer, injury and damages in the form of lost income, lost reputation and professional
23 status, lost professional and personal opportunities, lost short and long-term career
24 expectations and satisfaction, lost ambition and motivation, substantial and increasing
25 humiliation, lost belief and faith, deteriorating health and well-being, significant and
26 increasing emotional distress, and other actual damages in an amount to be proved at trial.
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1 **SECOND CAUSE OF ACTION:**

2 **HOSTILE WORK ENVIRONMENT BASED ON**

3 **RACE, GENDER, AND RETALIATION FOR EEO PARTICIPATION**

4
5 77. Paragraphs 1 to 76 are incorporated here by reference.

6 78. A reasonable African-American man would easily find that the
7
8 discriminatory atmosphere that has long characterized Daves' workplace sufficiently
9 polluted his experience, even before the day Daves subjectively identified the racial,
10 gender, and retaliatory animus underlying it. By making it much more difficult for Daves
11 to do his job, take pride in his work, and desire to stay on in his position, management
12 effected an additional violation of Title VII. The segregationist employment practices
13 used by USAO management turned Daves' work environment into a type of apartheid.
14 The covert nature of those practices does not immunize USAO from responsibility. Title
15 VII provides no safe harbor for any race, gender or retaliation abuse, regardless of how
16 crafty or subtle the delivery.
17
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19 79. Daves has not merely been shunned. The prevalence of disparities evocative
20 of racial and gender-based hierarchies was significant exacerbating factors in terms of the
21 severity of the workplace hostility. The employment barriers and restrictions that were set
22 in place years ago because of Daves' failure to meet certain stereotyped race and gender-
23 based expectations had the intended effect of isolating Daves to such a degree that the
24 discriminatory insult permeated virtually all aspects of his workplace.
25
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1 80. To subject Daves to a persistent pattern of unspoken sabotage in order to
2 raise serious questions about his intelligence or competency was to shackle him at the
3 ankles; the very fact that management raised false questions was damage enough, in this
4 society. The same was true for persistently negative baseless actions designed to raise
5 questions about Daves' masculinity, strength, or readiness for "hard-ball" litigation.
6

7
8 81. At the same time, management's contemptuously preemptive conduct
9 rendered Daves helpless to challenge its persistently unlawful practices. Given his
10 immutable traits, Daves was naturally conspicuous, making it virtually impossible for him
11 to maintain even an appearance of dignity in the face of the subservient role he has been
12 forced to play.
13

14 82. Although management coupled its discriminatory case assignment practices
15 and other manipulations with additional insulting conduct and comments intended to
16 demoralize Daves, no further insult was necessary for material, lasting damage to be done.
17 Daves' white supervisors, who were rarely victims of racial assault, may have viewed
18 their collective actions in a vacuum without a full appreciation of how Daves, given his
19 experiences in life, perceived them. They may have thought that they actions and
20 comments were innocent or only mildly offensive.
21
22

23
24 83. But, in reality, to Daves the actions were intolerably threatening not just to
25 his long-range career aspirations but to his basic concepts of job security and livelihood.
26 The same can be said for the offensive conditions that exemplified gender-based animus
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1 emanating from management's view that Daves failed to exhibit sufficient attributes
2 stereotypically associated with his gender.

3
4 84. Submission to the unwelcome subservient role was made an explicit term or
5 condition of Daves' employment, the moment Weidman told Daves on January 31, 2008
6 that he was further justified in denying him the cases he wanted because he had hired him
7 as a "Title VII lawyer."

8
9 85. As oppressive as his work conditions had become before Daves filed his
10 complaint, they grew much worse once Daves took action to expose the discrimination.

11
12 86. As for Daves' supervisors in Civil, they were no longer able or willing to
13 conceal their antipathy and contempt behind common workplace courtesies. The pre-
14 existing, veiled hostility rose to the surface, in close and suspicious temporary proximity
15 to Daves' opposition practice. From that point on, Daves experienced mistreatment
16 stemming from an imbalance of power and a capitalizing on that imbalance at Daves'
17 expense, fostering a sense of degradation in Daves.

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20 87. The post-complaint hostility, which systematically and continuously deprived
21 Daves of the right to participate in the workplace on equal footing with other AUSAs, did
22 not stop at open snubs and discourtesies. It devolved into a steadfast and continual failure
23 to engage in good-faith interactions regarding Daves' case-related requests and complaint-
24 related inquiries. It then escalated to outright vengeance, the point where even the EEO
25 office of EOUSA, which was charged with investigating Daves' complaint, responded not

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1 just combatively but spiteful, lashing out at him with statements only the most amateur of
2 litigation adversaries would make, like “you can dish it out, but you can’t take it!”

3
4 88. That management’s antipathy was mostly covert and subtle, as opposed to
5 overt and direct, made the work environment that Daves endured no less oppressive than
6 it would have been had Daves been subjected to a daily overt barrage of racial and
7 gender-based epithets. Through years of planned and rehearsed dishonesty, management
8 was able skillfully to confine Daves to a subordinate, demeaning status bearing no relation
9 to his education, training, work record, or commitment to the office. Endeavoring to take
10 his career from him was management’s way of saying to Daves “get out.”
11

12
13 89. The humiliation and abuse to which Daves was continually subjected were
14 unlawfully based on his race, gender, and EEO participation. Notably, Civil
15 management’s actions have consistently evinced an invidious process of favoritism and
16 selection, where AUSAs are either preferred or disfavored based on their race, gender,
17 EEO participation, or some combination of these protected classifications. Management’s
18 support of Daves would have been appreciably stronger if he were not African-American,
19 did not exhibit gender characteristics that management found off-putting, and accepted his
20 subordinate position without complaint. In fact, when Daves litigated the cases
21 management saw fit to give him, his supervisors gladly left him alone, for the most part.
22

23
24 90. Civil management’s harassing conduct, coordinated through the Front
25 Offices of the USAO and EOUSA, made it much harder for Daves to complete his work,
26 made him “an object lesson about the perils of complaining,” created a work environment
27
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1 in which co-workers felt compelled to distance themselves from and avoid associating
2 with him or seeking his guidance and counsel, negatively impacted his future career
3 prospects in material respects as evidenced in significant part by the denied promotion,
4 thwarted his short and long-term career goals and aspirations, negatively affected his
5 future career prospects, and thus effectively eliminated any threat he, and persons like
6 him, might otherwise have posed to entrenched managerial authority.
7
8

9 91. Daves' present hostile work environment will continue for as long as the
10 present managers retain their positions. Indeed, the workplace oppression is sufficiently
11 extraordinary and egregious as to overcome the normal motivation of a competent,
12 diligent, and reasonable employee to remain and earn his livelihood and serve his
13 employer. Even though Daves has continued to work at USAO, which essentially
14 mitigates his damages, management's pattern and practice of harassment has created a
15 work environment in which a reasonable person could easily conclude that he has no
16 rational alternative but to resign.
17
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20 92. The impermissible factors of race, gender, and EEO activity influenced
21 management's decision-making collectively, individually, or in some combination thereof
22 depending upon the particular set of circumstances at any particularly time. For this
23 reason, although any attempt to separate Daves' identity at the intersections of race,
24 gender, and EEO participation could distort or ignore the particular nature of his
25 experience, Daves also asserts separate hostile work environment claims based on each
26 impermissible factor, as well as claims based on the combination of impermissible factors.
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1 93. As a result of the unlawful conduct, Daves has suffered, and will continue to
2 suffer, injury and damages in the form of lost income, lost reputation and professional
3 status, lost professional and personal opportunities, lost short and long-term career
4 expectations and satisfaction, lost ambition and motivation, substantial and increasing
5 humiliation, lost belief and faith, deteriorating health and well-being, significant and
6 increasing emotional distress, and other actual damages in an amount to be proved at trial.
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9 **THIRD CAUSE OF ACTION:**

10 **RETALIATION**

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12 94. Paragraphs 1 to 93 are incorporated herein by reference.

13 95. Under Title VII, the adverse actions comprising the retaliatory hostile work
14 environment fit the paradigm for an actionable retaliation claim as well. As with each of
15 the other claims, there is both direct and indirect evidence supporting this claim. Besides
16 the mosaic of convincing facts establishing an intent to punish Daves for asserting his
17 EEO rights, particularly after he lodged the complaint giving rise to this action, a
18 reasonable employee would have found the challenged retaliatory actions to which Daves
19 was subjected materially adverse, such that they might well have dissuaded a reasonable
20 employee of the USAO from making or supporting a charge of discrimination. Further,
21 the materially adverse actions were causally linked to Daves' protected activity.
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25 96. As a result of the unlawful conduct, Daves has suffered, and will continue to
26 suffer, injury and damages in the form of lost income, lost reputation and professional
27 status, lost professional and personal opportunities, lost short and long-term career
28

1 expectations and satisfaction, lost ambition and motivation, substantial and increasing
 2 humiliation, lost belief and faith, deteriorating health and well-being, significant and
 3 increasing emotional distress, and other actual damages in an amount to be proved at trial.
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5 **SIXTH CAUSE OF ACTION:**

6 **ADVERSE IMPACT BASED ON**

7 **RACE, GENDER & EEO PARTICIPATION**

8
 9 97. Paragraphs 1 to 96 are incorporated here by reference.

10 98. Management has employed and continues to employ facially neutral
 11 employment policies and practices that have had the effect of disproportionately
 12 excluding persons in AUSA Daves' protected classes, including race, gender, EEO
 13 participation, or some combination thereof. For example, management has assigned cases
 14 in accordance with a "point" system, pursuant to which minority attorneys or EEO
 15 participants, historically received a disproportionate number of the lowest profile, most
 16 burdensome, and least desirable cases.
 17
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19 99. The disparate impact discrimination and retaliation experienced by Daves
 20 was *because of* his race, gender and EEO activity. The impermissible factors of race,
 21 gender, and EEO activity influenced management's decision-making collectively,
 22 individually, or in some combination thereof depending upon the particular neutral policy
 23 or practice at issue. For this reason, Daves asserts separate claims based on each
 24 impermissible factor, as well as claims based on the combination of impermissible factors.
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1 100. As a result of the unlawful conduct, Daves has suffered, and will continue to
2 suffer, injury and damages in the form of lost income, lost reputation and professional
3 status, lost professional and personal opportunities, lost short and long-term career
4 expectations and satisfaction, lost ambition and motivation, substantial and increasing
5 humiliation, lost belief and faith, deteriorating health and well-being, significant and
6 increasing emotional distress, and other actual damages in an amount to be proved at trial.
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11 **REQUEST FOR RELIEF**

12 **WHEREFORE, PREMISES CONSIDERED,** Daves respectfully requests that
13 this Court enter judgment for him and against the defendant and that the judgment include
14 the following relief:
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16 1. A preliminary and ultimately permanent injunction that orders the DOJ and
17 the USAO, through concrete measures specified in a negotiated consent decree, to: (1)
18 correct at the local and national levels, any and all past unlawful employment policies,
19 procedures and practices from which this action arose; (2) institute and implement firm,
20 enforceable prospective measures that require Defendant to treat Daves, and employees
21 like him, on a consistently and permanently lawful and equal basis with those similarly
22 situated AUSAs who have historically received more favorable treatment, particularly
23 with respect to recruitment, hiring, training, and career development through case
24 assignments, promotions, and other employment opportunities; and (3) take any and all
25 necessary affirmative measures, including but not limited to transferring, demoting, or
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1 removing any and all offending officials from the positions they held during the time
2 periods giving rise to this action, in order to ensure that all AUSAs in the Civil Division
3 have a reasonable opportunity to enjoy a work environment responsibly free from
4 unwarranted and unlawful hostilities, harassment, intimidation, ridicule, and abuse;

5
6 2. A preliminary and, later, permanent injunction awarding Daves and other
7 AUSAs in Daves' protected classes any and all duties and responsibilities that they earned
8 or would have earned but for the unlawful discriminatory and retaliatory conduct of the
9 offending officials, including but not limited to reinstating Daves and any other
10 constructively discharged employees to their official positions of record and promoting
11 them to management-level supervisory positions in or outside the Civil Division;
12
13

14 3. Daves' actual damages, including but not limited to back and front pay and
15 other wages and benefits, as determined at trial;
16

17 4. compensatory damages, including but not limited to damages for the
18 significant and increasing emotional distress that Defendant's unlawful conduct has
19 caused Daves;
20

21 5. Daves' attorney fees and costs under Title VII and the Equal Access to
22 Justice Act;
23

24 6. any and all appropriate remedies available under Title VII;

25 7. pre- and post-judgment interest, to the maximum extent the law allows; and
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1 8. all other relief as law and justice requires.
2
3

4 DATED: November 18, 2009

Respectfully submitted,

5
6 MICHAEL L. COHEN, a PLC
7

8 By: /s/ Michael L. Cohen

9 Michael L. Cohen

10 Attorney for the Plaintiff,

11 IRA DAVES
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JURY DEMAND

Plaintiff demands a jury trial per Fed. R. Civ. P. 38 on all issues that may be tried to the jury.

DATED: November 18, 2009

MICHAEL L. COHEN, A PLC

By: /s/ Michael L. Cohen

Michael L. Cohen

Attorneys for Plaintiff

IRA A. DAVES